

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION TO CHANGE WATER RIGHT NO. 42M 30160424 BY DUANE ULLMAN	}	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On April 19, 2023, Duane Ullman (Applicant) submitted Application to Change Water Right No. 42M 30160424 to change Statements of Claim 42M 117148-00 and 42M 117150-00, and Groundwater Certificates 42M 89088-00 and 42M 111274-00 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of April 26, 2023. The Department held a pre-application meeting with the Applicant on January 25, 2023.

An Environmental Assessment for this Application was completed on May 4, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change an Existing Non-Irrigation Water Right, Form 606-NIR
- Attachments: Project narratives
- Maps: Aerial photos showing the location of the water rights and the conveyance works
- Change in Purpose Addendum, Form 606-PA

Information within the Department's Possession/Knowledge

- Information contained in the active file of Water Right Nos. 42M 117148-00, 42M 117150-00, Groundwater Certificates 42M 89088-00, and 42M 111274-00.
- Environmental Assessment dated May 4, 2023 by DNRC Water Resource Specialist Lih-An Yang

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the four water rights listed in Table 1. Their points of diversion and places of use are in SESE Section 12, Township (T) 24N, Range (R) 58E, approximately 10 miles northwest of Sidney, MT. Table 1 summarizes the elements of the water rights proposed for this change application:

Table 1: Water rights proposed for change

Water Right	Purpose	Flow Rate (GPM)	Diverted Volume (AF)	Period of Diversion	Point of Diversion	Place of Use (all in Richland County)	Priority Date
Statement of Claim 42M 117148-00	Stock 533 AU	Same well 8	9	01/01-12/31	Same well SWSESE Sec 12 T24N R58E	SWSESE Sec 12 T24N R58E	01/15/1973
Statement of Claim 42M 117150-00	Domestic		2.2	01/01-12/31		SWSESE Sec 12 T24N R58E	01/15/1973
Groundwater Certificate 42M 89088-00	Domestic (2 households)* Lawn & Garden 0.5 acre Stock 300 AU**	7	N/A; for additional flow rate only	01/01-12/31	NWSESE Sec 12 T24N R58E	SWSESE Sec 12 T24N R58E	03/17/1994
Groundwater Certificate 42M 111274-00	Stock 177 AU** Lawn & Garden 2 acres*** Domestic 2****	8	10	01/01-12/31	SESESE Sec 12 T24N R58E	SESESE Sec 12 T24N R58E	02/2/2000

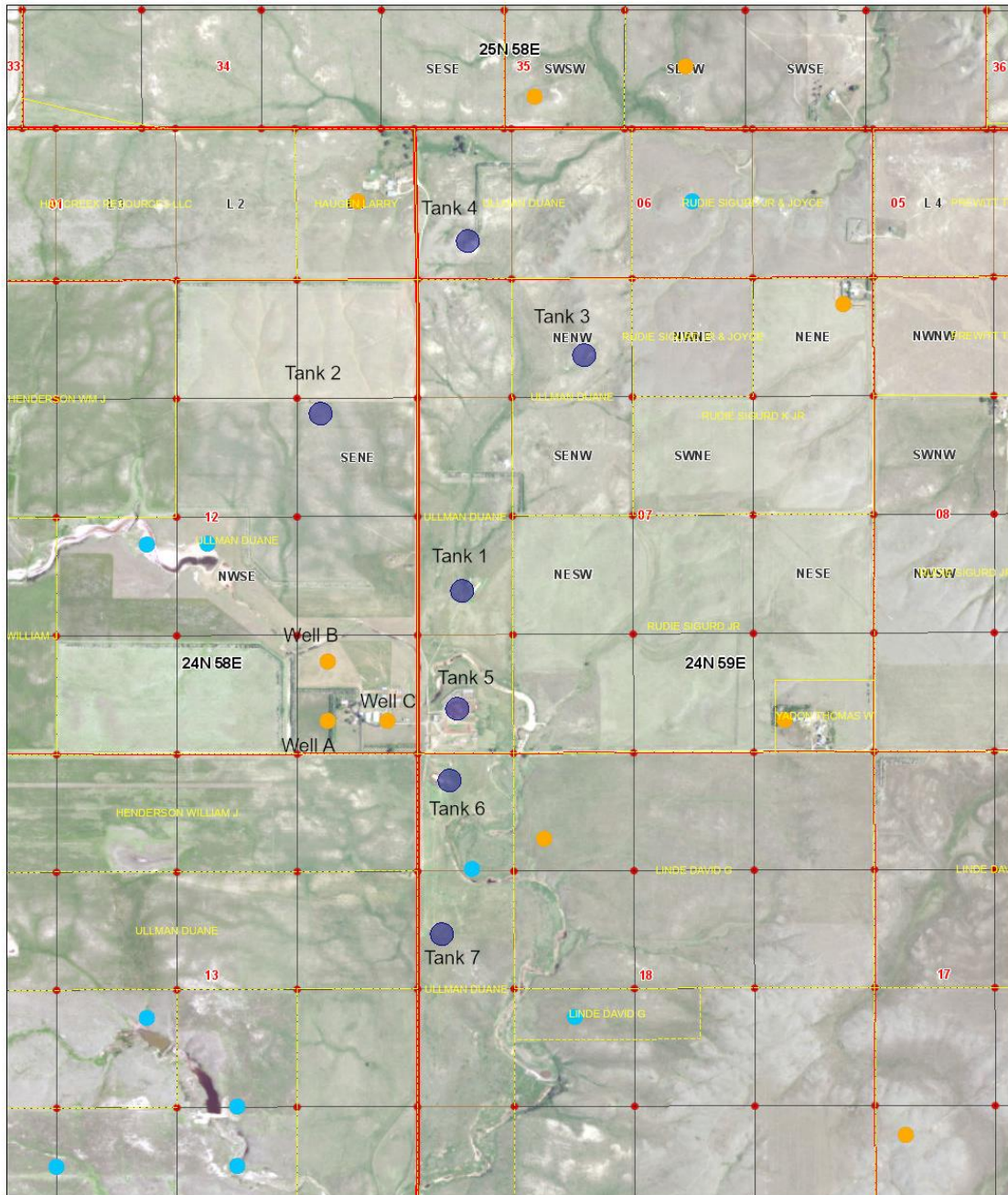
* Including the household filed with 42M 117150-00

** Included in the 533 AU filed with 42M 117148-00

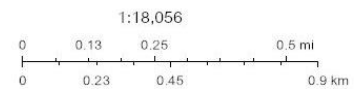
***Including the 0.5 acres filed with 42M 89088-00

****Same two domestic uses as those filed with 42M 89088-00

Figure 1: Historic and Proposed Use--Ullman Change Application 42M 30160424



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Historic Well A: 42M 117148-00 & 42M 117150-00

Historic Well B: 42M 89088-00

Historic Well C: 42M 111274-00

● Proposed stock tank location

2. Groundwater Certificate 42M 89088-00, served by Well B (see Figure 1) with a priority date of March 17, 1994, was filed for additional flow rate only to supplement 42M 117148-00 and 42M 117150-00, served by Well A (see Figure 1). It was issued without a decreed volume. The three water rights are a manifold system with combined use of 15 GPM and up to 11.2 AF. The manifold system diverts water year-round. Domestic and livestock uses are from January 1 to December 31; lawn and garden use occurs from May 15 to October 15.
3. Groundwater Certificate 42M 111274-00, served by Well C (see Figure 1) with a priority date of February 2, 2000, piped the well into the manifold system. This water right diverts water year-round. Domestic and livestock uses are from January 1 to December 31; lawn and garden use occurs from May 15 to October 15.
4. The Applicant is the sole owner of these four water rights.
5. The water rights being changed in this application are located in Basin 42M, the Yellowstone River Basin below Powder River. This basin is not subject to any basin closures or controlled groundwater area restrictions.

CHANGE PROPOSAL

FINDINGS OF FACT

6. This change application proposes to incorporate Statements of Claim 42M 117148-00 and 42M 117150-00, Groundwater Certificates 42M 89088-00 and 42M 111274-00, into one manifold system. Per ARM 36.12.1901(7), the proposed change would change all four water rights in one application so that the diversion, place of use, and purpose information will be the same for all four water rights in the manifold. There has not been any previous change authorization on any of the water rights proposed for change in this application.
7. The proposed place of use is SESE Sec 12, T24N R58E, Richland County. The application also proposes to add seven stock tanks to the system. The stock tanks are located in:

Tank 1 in Gov Lot 3, SENWSW, Sec 7, T24N R59E, Richland County
Tank 2 in NWSENE Sec 12, T24N R58E, Richland County
Tank 3 in SWNENW Sec 7, T24N R59E, Richland County
Tank 4 in Gov Lot 4, W2W2, Sec 6, T24N R59E, Richland County
Tank 5 in Gov Lot 4, SWSWSW, Sec 7, T24N R59E, Richland County
Tank 6 in Gov Lot 1, NWNWNW, Sec 18, T24N R59E, Richland County
Tank 7 in Gov Lot 2, SWSWNW, Sec 18, T24N R59E, Richland County

8. The combined purposes of the four water rights would be for two-household multiple domestic use, two acres of lawn/garden, and livestock up to 533 animal units (AU). The total appropriation would be three wells with a total of 23 GPM and 17.2 AF. The manifold system will divert water year-round. Domestic and livestock uses are from January 1 to December 31; lawn and garden use will occur from May 15 to October 15.

9. The Applicant proposes to continue operating the manifold system at the combined historic flow rate (23 GPM) and historic diverted volume (17.2 AF) year-round. Flow rate and volume will not increase on the source of water supply as a result of this change. Under the change authorization, 8 GPM and 9 AF will be diverted via Claim 42M 117148-00, 8 GPM and 2.2 AF via Claim 42M 117150-00, 7 GPM and 2.25 AF via Groundwater Certificate 42M 89088-00, and 8 GPM and 3.75 AF via Groundwater Certificate 42M 111274-00.

10. The Applicant's objective of adding seven stock tanks is to rotate grazing pastures more effectively. The NRCS assisted with the design and installation of the livestock pipelines.

11. Table 2 reflects the outcome of the four water rights under the change authorization:

Water Right	Purpose	Flow Rate (GPM)	Diverted Volume (AF)	Period of Diversion	Point of Diversion	Place of Use (all in Richland County)	Priority Date
Statement of Claim 42M 117148-00	Stock 533 AU Lawn & Garden 2 acres Domestic 2	Same well 8	9 (533 AU)	01/01-12/31	SWSESE NWSESE SESESE	SESE Sec 12 T24N R58E & 7 stock tanks	01/15/1973
Statement of Claim 42M 117150-00	Stock 533 AU Lawn & Garden 2 acres Domestic 2		2.2 (1 house)	01/01-12/31	Sec 12 T24N R58E	SESE Sec 12 T24N R58E & 7 stock tanks	01/15/1973
Groundwater Certificate 42M 89088-00	Stock 533 AU Lawn & Garden 2 acres Domestic 2	7	2.25 (1 house & 0.5 acre L/G)	01/01-12/31	SWSESE NWSESE SESESE Sec 12 T24N R58E	SESE Sec 12 T24N R58E & 7 stock tanks	03/17/1994

Groundwater Certificate 42M 111274- 00	Stock 533 AU Lawn & Garden 2 acres Domestic 2	8	3.75 (1.5 acre L/G)	01/01- 12/31	SWSESE NWSESE SESESE Sec 12 T24N R58E	SESE Sec 12 T24N R58E & 7 stock tanks	02/2/2000
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CHANGE CRITERIA

12. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶¶ 8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

13. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

14. Statement of Claims 42M 117148-00 and 42M 117150-00, and Groundwater Certificates 42M 89088-00 and 42M 111274-00 are included in the proposed change. The existing combined use is for two households, two acres of lawn/garden, and livestock up to 533 AU.

15. The historic place of use occurs in SESE Sec 12, T24N R 58E. Two households, two-acre lawn and garden, as well as livestock facilities are all located within the place of use.

16. Stock Use—Statement of claim 42M 117148-00 has a January 15, 1973 priority date and claimed 9 AF stock use for 533 AU year-round with a flow rate of 8 GPM. This volume meets the ARM 36.12.115(2)(c) stockwater use standard of 0.017 AF/year per AU. Groundwater Certificate 42M 89088-00 was filed for 300 AU in 1994 and supplied an additional flow rate of 7 GPM with no decreed volume. Groundwater Certificate 42M 111274-00 was filed for 177 AU in 2000 with a flow rate of 8 PGM. The 300 AU and 177 AU are part of the 533 AU claimed by the Applicant with 42M 117148-00. Therefore, the maximum historic livestock use of the three water rights is 533 AU. The combined flow rates supplied by the three wells for the manifold system total 23 GPM. The Department has determined that stock use is 100% consumptive; therefore, historic diverted volume for stock also equals historic consumptive volume of 9.0 AF per year.

17. Domestic Use—Statement of Claim 42M 117150-00 with a priority date of January 15, 1973 claimed 8 GPM and 2.2 AF per year for one domestic household. Groundwater Certificate 42M 89088-00 was filed for additional 7 GPM flow rate and added one more household to the purpose but did not have a decreed volume. Per ARM 36.12.115(2)(a) for groundwater certificate, the standard for one household use year-round is 1.0 AF per year. Therefore, the historic domestic use diverted by Statement of Claim 42M 117150-00 and Groundwater Certificate 42M 89088-00

combined is 3.2 AF at 15 GPM. According to DNRC standards, the consumptive volume assigned to domestic use is 10% of diverted volume. Therefore, the historic consumptive volume for the two households is $3.2 \text{ AF} \times 10\% = 0.32 \text{ AF}$ per year.

18. **Lawn & Garden Use**— Per ARM 36.12.115(2)(b), the standard for lawn/garden use is 2.5 AF per acre per season. Groundwater Certificate 42M 89088-00 included a lawn/garden purpose for 0.5 acre, which diverted 1.25 AF per year. Groundwater Certificate 42M 111274-00 added 1.5 acres of lawn & garden irrigation to the system in 2000, which diverts 3.75 AF per year. Therefore, the historic diverted volume for lawn and garden by Groundwater Certificate 42M 89088-00 and Groundwater Certificate 42M 111274-00 combined is 5 AF per year. According to DNRC standards, the historic consumptive volume for lawn and garden irrigation is based on the net irrigation requirement for alfalfa at similar location. In accordance with ARM 36.12.1902(15)(16) inputs for Sidney, Richland County area, sprinkler irrigation consumes a total of 4.29 AF per year. Table 3 calculates the historic volume of water consumed by lawn and garden use for the two groundwater certificates:

Table 3: Calculation of historic volume consumed by lawn and garden for Groundwater Certificates 42M 89088-00 and 42M 11274-00:

Table 3: Calculation of historic consumptive volume y lawn and garden								
Water Right	Richland County (Sidney) IWR Center Pivot Irrigation Seasonal ET (Inches)	Historic Management Factor (Percent)	Historic Acres	HCV AF	On-farm Efficiency (Percent)	Field Application AF	Historic Irrecoverable Losses (IL) Sprinkler 10%:	HCV AF (Including IL)
42M 89088-00	25.45	88.4%	0.5	0.94	70%	1.34	0.13	$0.94+0.13=1.07$
42M 111274-00	25.45	88.4%	1.5	2.81	70%	4.02	0.40	$2.81+0.40=3.21$
								Total = 4.29

19. The historic diverted and consumed volume for each purpose is summarized in Table 4:

Table 4: Historic Diverted and Historic Consumed Volume for Each Purpose				
	Livestock	Domestic	Lawn/Garden	Total
Historic Diverted Volume (AF)	9	3.2	5	17.2
Historic Consumptive Volume (AF)	9	0.32	4.29	13.6

20. The historic use of all four water rights proposed for change is summarized in Table 5:

Table 5: Summary of Historic Use of Four Water Rights Proposed for Change								
Water Right	Use	Flow Rate (GPM)	Diverted Volume (AF)	Consumed Volume (AF)	Period of Use	Point of Diversion	Place of Use (Richland County)	Priority Date
Statement of Claim 42M 117148-00	Stock 533 AU	Same well 8	9	9	01/01-12/31	Same well SWSESE Sec 12 T24N R58E	SWSESE Sec 12 T24N R58E	01/15/1973
Statement of Claim 42M 117150-00	Domestic 1		2.2	0.22	01/01-12/31		SWSESE Sec 12 T24N R58E	01/15/1973
Groundwater Certificate 42M 89088-00	Domestic 1 Lawn & Garden 0.5 acres	7	Domestic 1 Lawn & Garden 1.25	Domestic 0.1 Lawn & Garden 1.07	01/01-12/31; 05/15-10/15 for lawn/garden	NWSESE Sec 12 T24N R58E	SWSESE Sec 12 T24N R58E	03/17/1994
Groundwater Certificate 42M 111274-00	Lawn & Garden 1.5 acres	8	3.75	3.21	01/01-12/31; 05/15-10/15 for lawn/garden	SESESE Sec 12 T24N R58E	SESESE Sec 12 T24N R58E	02/2/2000

FINDINGS OF FACT – Adverse Effect

21. Per ARM 36.12.1901(7), the Applicant proposes to change the purposes of Statements of Claim 42M 117148-00 and 42M 117150-00 and Groundwater Certificates 42M 89088-00 and 42M 111274-00 to reflect multiple domestic, lawn and garden, and stock uses on all four water rights in the manifold system. The proposed change will not increase the total number of households, lawn and garden acreage, and animal units served by these water rights. The source of water and flow rates of the wells will remain the same; the proposed consumed and diverted volumes for this change are the same as the historic consumed and diverted volumes of 13.6 AF and 17.2 AF, respectively.

22. The place of use for the livestock purpose will be spread out with seven additional stock tanks. The stock tanks range from 0.1 mile to 1.2 miles from the historic place of use. The animal units will remain the same as the historical use, for a maximum of 533 AU consuming up to 9 AF per year.

23. Under the proposed application, all four water rights will divert water from January 1 to December 31. Multiple domestic and livestock uses will have a period of use from January 1 to December 31, and lawn and garden May 15 to October 15. The proposed period of diversion and period of use remain consistent with the historic use.

24. The Department finds the Applicant has the ability to manage and control the system. The Applicant monitors the system routinely and takes corrective action as necessary to prevent adverse effect to other water users.

BENEFICIAL USE

FINDINGS OF FACT

25. Per ARM 36.12.1901(7), the proposed change would change all four water rights in one application so that the diversion, place of use, and purpose information will be the same for all four water rights in the manifold. The Applicant proposes to use water for multiple domestic, lawn and garden, and livestock for all four water rights. These uses are recognized beneficial uses by the Department. §85-2-102(5)(a), MCA.

26. Applicant proposes to use a combined flow rate of 23 GPM and 17.2 AF diverted volume from the manifold system. Two domestic households will appropriate 3.2 AF per year, two acres

of lawn and garden 5 AF per year, and 533 AU of livestock 9 AF per year. The appropriated volume is within the Department's standards and will not exceed the historic use of the existing water rights on the same source of water.

27. By adding seven stock tanks, the Applicant will be able to manage grazing rotation more effectively and improve range condition.

28. The Department finds that the proposed diverted flow rate of 23 GPM and volume of 17.2 AF are adequate to support the beneficial uses listed above.

ADEQUATE DIVERSION

FINDINGS OF FACT

29. All three wells have $\frac{3}{4}$ HP submersible pumps with check valves installed to prevent backflow, as well as electrical disconnects and shut-off valves.

30. The well manifold is centralized in a heated pump house. There is a 44-gallon pressure tank in the pump house with a pressure switch in case water volume drops due to a pump failure.

31. Two wells, Well A (serving Statements of Claim 42M 117148-00 and 42M 117150-00) and Well B (serving Groundwater Certificate 42M 89099-00) tie into the manifold at the pump house. Both have ball valve shut-offs and electrical disconnects. Well B (serving 42M 89088-00) is northwest of the pump house. It supplies water via a 700-foot 1½-inch poly pipeline rated 160 psi buried 7 feet underground. See Figure 1 for well location.

32. From the pump house, another pipeline, 1-inch poly 100 psi buried 7 feet underground, travels southwest 300 feet to a T junction. North side of the T, the line goes 105 feet straight north to a family dwelling. South of the T, the line heads 75 feet south and 100 feet southeast to another family dwelling. At this dwelling is the location of Well A which ties into water system with a preset pressure switch.

33. Well C (serving 42M 111274-00) is located 340 feet southeast of the pump house and ties directly to a network of water lines. Electric breaker is 30 feet west of well. These pipelines supply five 10-gallon tubs in the corrals, with stop-and-waste valve in the lines and float shuf-off valve in all the tubs. These lines are 1-inch poly rated 100 psi buried 7 feet deep.

34. Another pipeline travels 720 feet southwest from the pump house and serves as the lawn sprinkler line. It is 1-inch poly rated 100 psi buried 7 feet deep. The sprinkler system has a control panel to adjust time and length of watering. It waters two acres of lawn.
35. Three new pipelines deliver water to the seven added tanks under the proposed change. All lines are 1¼-inch PVC rated 120 psi buried 7 feet deep and approved by the NRCS. A stop-and-waste valve is installed in the line 20 feet to 40 feet before each tank, and a curb stop is installed in the line past each tank. All tanks have float switch and shut-off valve.
36. Starting from pump house, a new pipeline travels 2,071 feet northeast to Tank 1. From Tank 1, the line continues north for 933 ft to a T junction where a branch heads northwest for 2,306 feet to Tank 2. Back at the T junction, the line continues northeast for 1,537 feet to Tank 3, then 1,730 feet northwest further to Tank 4.
37. From the interior network of pipelines, a new line travels east for 512 feet to a stop-and-waste valve, then 20 feet further to Tank 5.
38. Back at the point where Well C intersects the interior pipelines, a new pipeline travels 100 feet to a curb stop, then continues on southeast 860 feet where the line branches off east for 135 feet to Tank 6. The main line continues south for 1,793 feet to Tank 7, with a hydrant at the end of this line.
39. The Department finds means of diversion, construction, and operation of the appropriation works are adequate for the project.

POSSESSORY INTEREST

FINDINGS OF FACT

40. The applicant is the sole owner of the water rights. The applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

41. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights,

permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

42. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of

¹ DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

43. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

Application For Beneficial Water Use Permit By City of Bozeman, Memorandum, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

44. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

45. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

46. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department's determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

47. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

48. Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

49. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

50. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic diverted volumes and flow rates of Statements of Claim No. 42M 117148-00 and 42M 117150-00, and Groundwater Certificates No. 42M 89088-00 and 42M 111274-00, to be 17.2 AF total diverted volume and 23 GPM cumulative flow rate with a total consumptive use of 13.61 AF. (FOF Nos. 14—20)

51. Based upon the Applicant's comparative analysis of historic water use to water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 21—24)

BENEFICIAL USE

52. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick,

69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

53. Applicant proposes to use water for stock, multiple domestic and lawn and garden which are recognized beneficial uses. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that stock, multiple domestic and lawn and garden are recognized beneficial uses and that 17.2 acre-feet of diverted volume and 23 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule/other standard. §85-2-402(2)(c), MCA (FOF Nos. 25—28)

ADEQUATE MEANS OF DIVERSION

54. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

55. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 29—39)

POSSESSORY INTEREST

56. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also Admin.R.M. 36.12.1802.

57. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 40)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 42M 30160424 should BE GRANTED subject to the following.

The Department has determined that the Applicant may manifold the conveyance systems for water rights Statements of Claim 42M 117148-00 and 42M 117150-00, Groundwater Certificates 42M 89088-00 and 42M 111274-00, and add seven stock tanks to the system. The combined use is for two-household multiple domestic uses, two acres of lawn/garden, and livestock up to 533 AU. The total appropriation is three wells with a total diversion of 23 GPM and 17.2 AF per year. Statement of Claim 42M 117148-00 will divert 8 GPM and 9 AF, Statement of Claim 42M 117150-00 will divert 8 GPM and 2.2 AF, Groundwater Certificate 42M 89088-00 will divert 7 GPM and 2.25 AF, and Groundwater Certificate 42M 111274-00 will divert 8 GPM and 3.75 AF. The four water rights will divert water from January 1 to December 31. Domestic and livestock uses are from January 1 to December 31; lawn and garden use will occur from May 15 to October 15.

The combined places of use are:

SESE Sec 12, T24N R58E, Richland County

Tank 1 in Gov Lot 3, SENWSW Sec 7, T24N R59E, Richland County

Tank 2 in NWSENE Sec 12, T24N R58E, Richland County

Tank 3 in SWNENW Sec 7, T24N R59E, Richland County

Tank 4 in Gov Lot 4, W2W2 Sec 6, T24N R59E, Richland County

Tank 5 in Gov Lot 4, SWSWSW Sec 7, T24N R59E, Richland County

Tank 6 in Gov Lot 1, NWNWNW Sec 18, T24N R59E, Richland County

Tank 7 in Gov Lot 2, SWSWNW Sec 18, T24N R59E, Richland County

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 31th day of May, 2023.

/Original signed by Todd Netto/
Todd Netto, Manager
Glasgow Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 31th day of May, 2023, by first class United States mail.

DUANE ULLMAN
34787 COUNTY RD 134
FAIRVIEW, MT 59221

Glasgow Regional Office, (406) 228-2561